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UNITED STATES SUPREME COURT

October 1998 Term

ERIC DAVENPORT, Petitioner,

vs.

COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC., Defendant.

On Petition for Writ of Certiorari to the Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

1. Did the Colorado appellate courts violate the Petitioner's due process rights by immunizing private community corrections in Colorado through a decision that this private industry had no duty to the public?
2. Did the Colorado appellate courts violate the equal protection rights of Eric Davenport as a member of the public by ruling that private community corrections had no duty to the public?
3. Did the Colorado appellate courts exceed their authority and violate equal protection and due process rights of this victim by immunizing private corrections in Colorado by finding that there was no duty to the public based upon financial considerations and policy considerations with no evidence in the record and such finding being contrary to legislative intent in Colorado and contrary to the Colorado Constitution when that industry blatantly violated state law and regulations of its state contracting agency as well as its own regulations?
4. Is the Colorado Supreme Court's decision that private corrections have no duty to the public so fundamentally unfair as to violate substantive and procedural due process?

5. Was the decision of the Colorado Supreme Court which set aside a jury verdict an arbitrary deprivation of property without due process of law thereby violating the Petitioner Eric Davenport's rights to substantive due process of law?

PARTIES:

A list of all parties to the proceeding:

1. Eric Davenport
2. Community Corrections of the Pikes Peak Region, Inc.

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PETITION FOR WRIT OF CERTIORARI

Eric Davenport, respectfully requests that a writ of certiorari issue to review the judgment and opinion of Colorado Supreme Court in this case.

OPINIONS ENTERED IN THE CASE BY COURTS CITATIONS OF THE OFFICIAL REPORTS OF BELOW:

The Colorado Court of Appeals decision is set forth as *Eric Davenport, Plaintiff-Appellee and Cross-Appellant, v. Community Corrections of the Pikes Peak Region, Inc., Defendant-Appellant and Cross-Appellee*, No. 94 CA 1283, 942 P.2d 1301 (Cob. App. 1997). Certiorari was granted by the Colorado Supreme Court September 8, 1997 and the Court of Appeals decision was affirmed by the Colorado Supreme Court in *Eric Davenport, Petitioner v. Community Corrections of the Pikes Peak Region, Inc., Respondent*, No. 97 SC 266, 962 P.2d 963 (Colo. 1998) on June 19, 1998 as modified on denial of rehearing on July 27, 1998.

STATEMENT OF THE BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT:

The initial opinion was issued by the Colorado Court of Appeals on January 9, 1997. Certiorari to the Colorado Supreme Court was granted on September 8, 1997. The Colorado Supreme Court issued an opinion on June 29, 1998 affirming the Colorado Court of Appeals decision. The Petition for Rehearing was denied and the decision was modified on July 27, 1998.

This court has jurisdiction to review on a writ of certiorari the judgments in question pursuant to 28 U.S.C. 1257.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE WITH APPROPRIATE CITATION ARE SET OUT IN THE APPENDIX.

A CONCISE STATEMENT OF THE CASE SETTING OUT THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED:

This is an appeal from a decision of the Colorado Supreme Court which affirmed the Colorado Court of Appeals wherein a jury verdict was set aside on the premises that a private community correctional facility had no duty to the public, essentially granting the private corporation judicial immunity. The jury verdict was on behalf of Eric Davenport against Community Corrections of the Pikes Peak Region, Inc. (hereinafter referred to as ComCor). The cause of action was for negligent supervision of an inmate who had caused injuries to Davenport. The jury found that the private corporation was 90% negligent and the proximate cause of Davenport's injuries. The verdict was for $1.9 million which included $435,000 for economic losses, $10,000 for disfigurement and $1,468,000 for non-economic losses or injuries. The verdict was reduced to $650,000 because of Colorado's statutory cap on pain and suffering, thereby reducing the $1,468,000 portion of the verdict to

$250,000.

The decisions of the Colorado Court of Appeals and the Colorado Supreme Court reversed a summary judgment which had been entered early in the proceedings by the trial court finding that the private corporation, ComCor, had a duty to the public and to prevent the public from foreseeable harm by its inmates. The Colorado Court of Appeals based its decision not to impose liability upon the financial instability which liability might cause in the private corrections industry. The Colorado Supreme Court affirmed the decision of the Colorado Court of Appeals noting that they did not desire private correctional industries to have to deal with the forseeabilitv in the community of the actions of their inmates or residents. This was despite a contractual obligation of the private industry with the Division of Public Safety to provide 24 hour supervision. The private industry, ComCor, boasted during trial that it, as a private corporation, had no duty to follow the law, the regulations of the Division of Criminal Justice which its contract required or its own regulations. In fact, in this case, the laws of Colorado were defied when the court was not notified of an inmate's violations of the regulations and conditions of placement, thereby placing the public at foreseeable risk. The regulations of the Division of Criminal Justice were not followed. ComCor's internal regulations were not followed. The result was that their inmate continued to

drink and drive and severely injured a member of the community.

In regard to the preservation of the record and raising of federal questions, the issues of duty to the public, equal protection, due process, and a taking in regard to the jury verdict reduction were brought up throughout the proceedings, primarily in the appellate court. In the initial trial proceeding, the trial court ruled at page 279 of the record:

> 1. The Court determines that the cases and legal authorities cited by the Plaintiff are persuasive to the effect that in Colorado, there is a duty upon entities such as the Defendant to exercise reasonable care to protect members of the public from harm caused by persons in the control of the Defendant.
> 2. Based upon the matters submitted to the Court, there are disputed material facts as to the foreseeability of injury and whether or not the Defendant exercised reasonable care.

ComCor never addressed the trial court's ruling regarding duty to the public in its initial briefs, although the Colorado Court of Appeals decision was based upon and reversed the trial court's ruling that ComCor did have a duty to the public. The issue of the private community correctional industry's duty to the public had been initially briefed by Davenport at pages 110 through 257 of the record in the trial court.

In the Answer Brief and Opening Brief

in the Colorado Court of Appeals, Davenport discussed the statutory requisites of the duty to him and the public and also brought up the fact that the reduction of the verdict was a taking of private property without due process of law. Davenport's Cross-Appellant's Reply Brief dealt with the unconstitutionality of imposing a cap on a verdict for noneconomic loss, addressing constitutionality and noting that because of Eric Davenport's disability, he was in a suspect class requiring heightened scrutiny.

The Petition for Rehearing** directed to the Colorado Court of Appeals at page 4 noted that to impose liability on ComCor

> would provide a message to this private organization that it had to follow reasonable precautions including the provisions of its contract, its own regulations, state laws, and the provisions of the regulations of its contracting agency, as well as the dictates of the court. These are due process and equal protection rights for victims such as Eric Davenport.

The Petition for Certiorari to the Colorado Supreme Court specifically addressed the federal questions in the following context as an issue to be considered:

> Is the action of the Court of Appeals in giving a private entity immunity unconstitutional as a denial of due process, equal protection, a taking, and a violation of the separation of

powers?

In the Opening Brief of the Petitioner to the Colorado Supreme Court, this Petitioner discussed equal protection, due process and taking issues in a section entitled "Constitutionality and Sovereign Immunity Problems" at pages 25 through 30** noting the distinctions of this case with the cases of other states noting that the grant of immunity by the Court of Appeals denied the public and this victim of equal protection and that the grant was without a rational basis. The brief discussed the violation by the Court of Appeals of the separation of powers and the direct violation of the Colorado constitution. The summary of argument in that brief stated as follows:

> The Court of Appeals erred in holding that a private corrections facility owed no common law or statutory duty to the public for the actions of its offenders. The Court of Appeals decision is judicial legislation which unconstitutionally immunized private community corrections thereby violating equal protection, due process, and becomes a taking, defying the concept of separation of powers.

ComCor's Answer Brief never addressed any of these concerns or issues.

In the Reply to Amicus Curiae Brief of Colorado Community Corrections Coalition, Community Corrections Services, Inc., and Adams Community Corrections Program, Inc., in the Colorado Supreme Court. public policy

and history issues were discussed in the context of *Richardson v. McKnight*, 117 S.Ct. 2100 (1997).

In regard to the facts of the case, the Petitioner, Eric Davenport, was severely injured in an automobile accident on January 14, 1989 in Colorado Springs. Colorado. He was the passenger in a car driven by Fred Rutledge, an inmate at the Community Correctional Facility of the Pikes Peak Region. At the time of the accident, Rutledge was out on a weekend pass driving his car, which was uninsured, and was intoxicated. This was not the first incident in which Rutledge had been driving while intoxicated during and previous to his stay at ComCor. Rutledge committed numerous other program violations in his less ten months at ComCor involving substance abuse and driving.

Alcohol and substance abuse were clearly noted in Rutledge's background prior to admission to ComCor. In its intake report, ComCor personnel noted Fred Rutledge's propensity for alcoholism and placed an "alcohol alert" on his file. ComCor acknowledged Rutledge's substance abuse problems in the treatment plan designed by ComCor which included mandatory Antabuse, therapy and attendance of Al-non meetings. ComCor records revealed a total of nine (9) infractions by Rutledge involving alcohol and drugs during his ten (10) months at ComCor, not including the January 14, 1989 automobile accident. In addition, Rutledge at his sentencing was

placed at ComCor for burglary, the non-violent crime, and placed on probation for the violent crime which included using his vehicle as a weapon while he was intoxicated injuring other persons. Judge Railey, the sentencing judge, had noted that the ComCor and probation were to work together with ComCor to be the responsible party. ComCor accepted Rutledge for 'treatment'.

The most blatant violation by Rutledge prior to the January. 14, 1989 accident occurred on September 20, 1988. A ComCor incident report documented Fred Rutledge driving his uninsured car erratically with several other inmates in the car. A subsequent breathalyzer analysis administered by ComCor revealed Rutledge's blood alcohol content to be .27 and ComCor officials acknowledged that no one, including the judge or his probation officer, was alerted. He was also written up for reckless driving on another occasion. Rutledge had no drivers license and had presented an insurance card which showed him insured for only one day. Rutledge substituted aspirin for Antabuse. All of these problems were because ComCor did not follow regulations or the law.

Davenport's action for negligent supervision of Rutledge resulted in a jury verdict finding ComCor negligent. ComCor's failure to notify the court and Rutledge's probation officer of Rutledge's numerous incidents involving alcohol, marijuana, and other drugs, the failure to follow the

treatment plan devised by ComCor which set forth condition of his placement and ComCor's failure to follow state law, regulations of ComCor and the Division of Criminal Justice and their own contract all led up to the accident, resulting in injury to a member of the public, Eric Davenport.

In an appeal initiated by ComCor the verdict was reversed. ComCor was effectively granted quasi-judicial immunity by the appellate courts when the case was dismissed. The Court of Appeals ruled that this private correctional facility owed no duty as a matter of law to protect any member of the public from the actions of any of its inmates. The Court of Appeals based this decision upon financial considerations and noted that they did not believe that this accident was foreseeable, ignoring the many program and law violations and the facts. This decision effectively gives immunity as a matter of law to all private correctional facilities.

The Colorado Supreme Court affirmed the decision of the Colorado Court of Appeals, ruling that the private correctional facility had no duty to the public because the Supreme Court did not want community corrections private industries to have to deal with foreseeability of what their inmates would do to members of the public.

ARGUMENT

The Court of Appeals and Colorado Supreme Court in this case made a decision that ComCor had no duty to this victim "or

any other member of the public." The Court underlined the part of the legislation providing in the mission statement that Community Corrections organizations is "to provide for public safety". However, the decisions of the Colorado Appellate Courts create a special classification of a private industry which jeopardizes the safety of the public. Their decisions are contrary to both the federal and state constitutions and are without any rational basis. The rights of the members of the public are taken away by these decisions which deny Eric Davenport and all members of the Colorado public due process and equal protection. These decisions take away a verdict which was given to Davenport, now a disabled member of society, by a jury, not for punitive damages, but for actual damages.

An equal protection analysis requires that policy matters are considered. The public has a right to expect that they will be protected from crimes of residents of community corrections facilities, especially when the residents are incarcerated for those types of crimes or have such a criminal history. The legislative goals of privatization of community corrections is to "balance the needs of the stakeholders." Public policy and common sense would require that members of the public, such as Eric Davenport or any other victim of foreseeable criminal activity, are among the stakeholders. This is especially true when the inmates of ComCor are

in a custodial situation which is for offenders who have already injured society and committed crimes where prison, not jail, is the alternative. The impact of these decisions would be to allow the ComCor inmates to continue to offend throughout their sentence period with no liability to the public and to encourage ComCor not to follow rules, regulations and state laws.

Community corrections is increasing at an alarmingly pace placing thousands of criminals each year in direct contact with the public. Colorado has enacted legislation which would eventually privatize all or most of corrections. These decisions would give that industry immunity not available to even the jailor or warden of state institutions. Finding that there is no duty to the public denies the public and Eric Davenport of equal protection of the laws. The Colorado Supreme Court and the Colorado Court of Appeals need to heed the dictates of *Romer v. Evans*, 226 S.Ct. 1620 at 1628 (1996):

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

The decisions to create a special

classification for private community corrections and immunize them to the detriment of the public and their criminals' victims is a denial of equal protection. As was indicated in *Romer, supra,* at 1628 "protection of the laws is a pledge of the protection of equal laws." Now is the time for this Court to consider the public policy implications of community corrections and to delineate that there is a duty owed to the public and to protect their due process and equal protection rights.

Through this decision the Colorado Court of Appeals and Supreme Court have so far departed from accepted and usual course of proceedings by usurping and contravening legislative policy and intent that the due process rights of Eric Davenport and all victims of private corrections who are members of the public have been and will be violated. All of our citizens, and especially members of the public who desire to live in an ordered society free from fear of victimization, have a liberty interest in seeing that the state, especially through our courts, does not flout the law depriving us of our constitutional rights to be safe in our homes and society. These decisions, through court actions, have been violations of equal protection and due process for every member of the public as well as Eric Davenport. As was noted in *Weiler v. Purkeit*. 137 F.3d 1047 at 1051 (8th Cir. 1998):

> Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept or ordered liberty.... [cites omitted] There are two different ways of stating a substantive due process claim. First, the state violates substantive due process when it infringes "fundamental" liberty interests, without narrowly tailoring that interference to serve a compelling state interest.... [cites omitted] Second, the state violates substantive due process when it engages in conduct that is so outrageous that it shocks the conscience or otherwise offends "judicial notions of fairness, [or is] offensive to human dignity.

This case reeks of the failure to limit the favoring of one class to the detriment of the injured and the public. Not only have the Colorado Courts violated due process by finding a compelling state interest, i.e. immunizing private corrections, without any facts or basis in the record, but they have created a special class which they are favoring for no valid reason. As was discussed in *Richardson, supra,* there is no tradition which is so rooted in tradition to justify granting this private industry immunity. Eric Davenport and any member of the public has a right to rely on being compensated for wrongs

which are done to them by private correctional industry's negligent supervision. Substantive due process forbids government from infringing on fundamental rights which are

> liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292 (1993)

The liability of a private business entity, whether a business which contracts with state agencies or otherwise, has not been limited through legislation in Colorado. Community Corrections did attempt to limit liability of private Community Corrections in Colorado since this verdict was rendered in 1994. However, all of these attempts were defeated. The rulings in this case are couched in the language of duty. However, by taking foreseeability out of and making it a precedent to the duty analysis, these decisions of the Colorado Supreme Court are creation of quasi-judicial immunity for a private lucrative corporation in Colorado. These courts decisions are beyond their authority, lack substantial basis required by the police power, lack the historical foundation for grants of private immunity, thereby violating substantive due process and equal protection of the laws. Immunity should not be extended to private businesses through case law without a strong historical tradition. Such an action is un-

constitutional as a denial of due process and equal protection. This decision is a taking of private property as well as contrary to case law and public policy throughout the nation and especially in Colorado.

This decision conflicts with recent dictates and case law of the United States Supreme Court. Immunity granted by courts to private corrections organizations was rejected in the recent case of *Richardson v. McKnight, supra*. The *Richardson* case was ignored by the Colorado Supreme Court. This United States Supreme Court in *Richardson* indicated that there was no historical or practical basis for giving private community corrections immunity. The *Richardson* case has been followed throughout the United States. Although it was cited in the briefs and argument of this case, the Colorado Supreme Court chose not to mention it. Any distinctions between the *Richardson* case and this case are not material enough to justify departure from the rationale or ruling of that case. There is no good reason to give private community corrections immunity, whether it be by claiming no duty to the public or otherwise. The public has a right to be protected from foreseeable actions of inmates, especially when various regulations and state laws are designed to prevent the very harm which occurred to Davenport. There is no other case in the nation which has declared that a private correctional industry will have no duty to the public when laws and regulations are blatantly violated. The

Richardson agency was for-profit and ComCor is not-for-profit. As was noted in *Halvorsen v. Baird*, 146 F.3d 680 at 686 (9th Cir. 1998):

> That difference is not material, because both profit and nonprofit firms compete for .. . [public] contracts, and both have incentives to display effective performance. That revenues may go to salaries and other activities of the firm, as opposed to dividends, is not likely to dampen the ardor of the nonprofit firm's employees.

The decisions of the Colorado courts have deprived Eric Davenport of property rights without due process of law. The District Court reduced the $1.9 million verdict to $625,000 because of a statutory cap on damages occasioned by pain and suffering. The Colorado Court of Appeals eliminated the verdict by determining that private corrections in Colorado would have no duty to the public because of the potential impacts on the financial stability of that private industry. The Colorado Supreme Court upheld the decision of the Colorado Court of Appeals indicating that to impose a duty to the public upon private corrections would require the private corrections industry to deal with the foreseeability of actions of their inmates, a responsibility which the Colorado Supreme Court did not want to impose upon private correctional industries. None of the decisions to reduce or eliminate Davenport's verdict were based upon any ex-

ceptional needs of the public or any rational exercise of the police power. Thereby, these decisions have deprived Eric Davenport of property rights without due process of law. These decisions are not in accord with either federal or state law and should be reviewed by this Court.

The rights of Eric Davenport to the verdicts determined by a jury for compensatory damages are property rights which should not be taken away by state action, i. e. court or legislative decision, without due process of law. The property rights acquired by a judgment through a verdict are property rights which cannot be taken away from a citizen without due process of law. The right to use and maintain private property without state interference is a fundamental right. This right is protected by both state and federal constitutions. The Fourteenth Amendment of the Federal Constitution prevents deprivation of private property by state action without due process of law.1 Whether a state has acted in such a manner to deprive a person of property without due process of law so as to constitute a

1. See Section 600 of Constitutional Law, 16B Amiur 2d at 68 citing *Collins v. Welsh*, 75 F.2d 894.99 A.L.R. 1319 (C.C.A. 9th Cir. 1935), cert. Denied, 295 U.S. 762, 55 S. Ct. 921, 79 L.Ed. 04 (1935); *Pennsylvania Co. For Insurances on Lives and Granting Annuities v. Scott*, 346 Pa. *1329* A.2d 328, 144 A.L.R. 849 (1942).

"taking" and violate that person of constitutional rights depends on a variety of considerations. The purpose of the procedure must be considered. The effect upon the person's rights must be taken into account as well as all of the surrounding circumstances which would render the action appropriate. A property owner, such as Eric Davenport, only has a constitutional right to possess property subject to the limitations of the police power of the state. The state, through legislation or court determination, has the right through the police power to limit or take away property rights if those unfettered rights endanger or threaten the health and safety of the general public. The state has the right to reasonably regulate property rights to promote and protect the general welfare so long as due process dictates of state and federal constitutions are met.2

The jury verdict of Eric Davenport was taken from him through the decisions of the Colorado Court of Appeals and the Colorado Supreme Courts. However, these decisions do not comply with due process requirements. The deprivation of Davenport's jury verdict is both a procedural and substantive due process and equal protection problem. In order for a person to have their property rights taken from them by state action such as legislative or court action, there must

2. See generally the discussion set forth in Sections 581 through 602 of Constitutional Law. 16B Am Jur.2d pages *38-69*.

be due process of law. A 'taking' or limitation of a property right through state action can only be justified through a valid exercise of the police power. The only justification of the Supreme Court in reversing liability of Community Corrections of the Pikes Peak Region was that they' would not impose any duty by ComCor to members of the public because of potential financial impacts. ComCor never presented one iota of evidence in either the trial court or the appellate courts as to financial impacts of liability to the public. The Colorado Supreme Court added to the 'taking' by indicating that they would impose no duty to the public on ComCor because they did not want private community corrections to have to deal with foreseeability of their inmates actions. Both of these appellate courts have used unfettered discretion to find there was no duty to the public in Colorado for private community corrections. This discretion is not allowed by either Colorado law or Colorado constitution. Their actions cross the line into the area of constitutional impropriety because both decisions lacked objective criteria.3 Neither the Colorado Court of Appeals nor the Colorado Supreme Court provided any rationale which was sup-

3. 'See *Pacific Mutual Life Insurance Co. v. Haslip,* Ill S.Ct. 1032 *at* 1046, 499 U.S. 1, 113 Led.2d 1(1991). Although dealing with punitive damages, the *Haslip* decision sets forth the requirements of procedural due process.

ported by the record to depart from traditional practice and procedures. The observations of *Honda Motor Co., Ltd V Oberg*, 114 S.Ct. 2331 at 2339, 512 U.S. *415* (1994) are appropriate in regard to due process analysis where "traditional practice provides a touchstone for constitutional analysis." As the *Oberg* Court went on to hold

> The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.4

This case involves Colorado's appellate courts making decisions which abrogated a jury verdict which defied state-prescribed limitations of both the Colorado constitution and legislature. Colorado's constitution in Article III provides for a separation of powers of the legislative, executive and judiciary branches of government.5 In this case, the Colorado appellate courts have effectively deprived Eric Davenport of his right to a jury verdict by immunizing private corrections in Colorado through a decision which finds no duty to the public

4. See *Honda Motor Co., Ltd V Oberg. supra,* at 114 S.Ct. 2331 at 2342.
5. See *People* v. *Zapotocky,* 869 P.2d 1234 (Colo. 1994) which discusses the distinctions of the three branches and the proscription against the courts deciding a case by exercising legislative or executive power.

for private corrections. This judicial action was despite a continued refusal of the legislature to immunize private community corrections. This judicial action, which included findings made by the Colorado Court of Appeals and speculations by the Colorado Supreme Court that any liability to the public by private community corrections would make the industry financially unstable, was without any evidence of financial problems in the correctional industry. The people of Colorado have been assured in their state constitution that there will not be any special treatment for private industry. Article V, Section 25 of the Colorado Constitution clearly states:

> The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:.. . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

By making a decision not based upon legislation or facts, the Colorado appellate courts have violated Article II, Section of the Colorado Constitution which provides:

6. 'See *E.B.* v. *Verniero*. 119 F.3d 1077 at 1 105(3rd Cir. 1997) noting that "liberty interests that trigger procedural due process may be created by state law or by the federal constitution itself." Citing *Sandin* v. *Conner*, 515 U.S. 472, 115 S.Ct. 2293. 132 L. Ed.2d 418 (1995).

Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

The dictates of substantive due process include the requirement that state laws and rights will be followed by state agencies such as our courts.6 Every citizen should be able to rely on their state courts not to violate their constitutional rights and not to take property, such as a jury verdict, through a court decision which is not based upon facts or traditional notions and history of common law. This 'taking' through judicial decision interferes with rights which are implicit in the concept of ordered liberty. The Colorado appellate courts have violated substantive due process.

The Court of Appeals and the Colorado Supreme Court have picked a private industry to immunize at the expense of the public. They have misapplied common tort principles involving duties owed to reasonably control the acts of third party tortfeasors. While it is the exception that a party is responsible for the negligent acts of others, liability will be found where such party takes charge of another who poses a risk or where a *special relationship* exists between the actor and the party. See RESTATEMENT (SECOND) OF TORTS § 319 *(1965);* RESTATEMENT (SECOND) OF TORTS § 315 (1965) cited *with approval in Perreira V. State of Colorado.* 768 P.2d 1198 (Cob. 1989); *Taco Bell. Inc.*

v. Lannon, 744 P.2d 43 (Colo. 1987); *Leake V. Caln* 720 P.2d 152 (Cob. 1986). This decision is denies the public of the traditional principles of tort liability. There was foreseeability and a duty to protect the public. They cannot be separated. This has become even more clear in the current legislation regarding Community Corrections.

The Court of Appeals did not find the custodial relationship of ComCor to Rutledge to be a special relationship. The Court of Appeals seems to have relied more upon inapposite authority from sister states based upon notions of sovereign immunity rather than a careful consideration of public policy applying the precedents of this Court. *Baumgart v. Grant County*, *50* Wash. App. 671, *750* P.2d 271 (1988); *Moore v. Commonwealth Department of Justice*, 114 Pa. Cmwlth. 56. 538 A.2d 111(1988)

Granting immunity to a private entity without specific reasons set forth by the legislature is a violation of due process. No private entity which openly violates the law and regulations, prior to this case, has been granted quasi-sovereign immunity or other immunity. The Court of Appeals relied on the *Baumgart* case to attempt to create immunity as a "matter of law" for private community corrections organizations pointing to the cost of liability to such entities as the deciding factor. There was no evidence, in the record, only supposition in briefs, showing that liability would be a financial burden. The *Baumgart* court was dealing with

an inmate who had spent a few days in jail as a punitive measure, i.e. "the custody was simply punitive incarceration" at page 274, not an inmate who had been sentenced to ComCor as therapeutic and safety 'to the public' issues. The *Baumgart* court indicated that this was not a situation of failure to enforce' and found that there was no liability as a "matter of law", noting that this was not a situation where regulations had not been followed. Here the Court of Appeals ignored the duty of ComCor to follow and enforce its regulations, the treatment plan imposed by the court and by their own acceptance letter, and the facts, including ComCor's 24 hour contractual supervision duty. In this case, the cause in fact was directly related to ComCor's blatant violation of state laws, the regulations of the Division of Criminal Justice, the reason for the incarceration as well as the failure to follow the treatment plan. Probation, the sentencing judge and Rutledge felt that this was an accident waiting to happen. Merely following rules, whether these rules be regulations or state laws, and the judge's orders would have prevented this accident. Recognizing ComCor's liability would accord due process to the public and to Davenport.

The inmate who injured Davenport was placed in a concurrent supervision situation by Judge Railey for his alcohol related offenses which were noted by the judge, the probation officer, ComCor's own "alcohol alert". That inmate continued to violate

the rules of ComCor engaging in various episodes of drinking, not going to counseling, not taking Antabuse, and even driving with a 2.7 blood alcohol content with two inmates less than three months prior to the incident of drinking and driving with Davenport in this tragic incident, all culminating in the episode for which the jury imposed liability. Reliance on *Baumgart* is not only misplaced, but public policy, common sense, justice and the particular facts of this case dictate that this should not be the law in Colorado or elsewhere. This case is contrary to case law across the country.

The Court of Appeals indicated that ComCor as

> Rutledge's custodians also were less well-equipped to diagnose his potentially dangerous propensities than were the psychiatrists in Perreira...

and that Rutledge did not

> display any bizarre, violent, or aberrant behavior that would set him apart from numerous other community corrections residents with substance abuse problems.

The Court of Appeals ignored the fact that ComCor is and holds themselves out as a "treatment facility" and the actual violations of Rutledge himself. Prior to admission to ComCor, Rutledge was interviewed by ComCor social workers. The ComCor social workers specifically noted Rutledge's past impulse control problems with respect to alcohol and other substances and were aware of

his criminal past. Further, ComCor social workers were aware that at least two of Rutledge's past criminal incidents were alcohol-related. ComCor social workers knew in particular, on one occasion Rutledge was intoxicated and rammed his car into another vehicle. The fact that Rutledge, while at ComCor, had driven a vehicle when he had a 2.7 blood alcohol content without insurance with two inmates as passengers should have been enough for ComCor to know that an accident like this would have happened and that there would be no other recourse for the victim The Court of Appeals ignored the violations and the history of Rutledge in ruling that the linkage between ComCor's negligent conduct and the later automobile accident was too attenuated for us to conclude that Rutledge's conduct and Davenport's injuries were reasonably foreseeable to Pikes Peak.

The safety of the Colorado public requires that insured private correctional facility not be given immunity as a matter of law without any fact finding by the legislature or even in the trial court. Correctional facilities such as ComCor have been in existence in Colorado for approximately twenty (20) years. At present, correctional facilities like ComCor offer several different types of inmate services, including diversion, transition, and work release. Both diversion and transition programs are primarily residential and require twenty-four (24) hour supervision of the inmate by con-

tract. ComCor offered and continues to claim to offer all of these services. At the trial ComCor claimed that they were a treatment facility. Rutledge had been sentenced to ComCor's diversion program in April of 1988.

The public policy import of this case is demonstrated by the increase of community correctional facilities nationally in recent years. There are approximately twenty two (22) such facilities operating in Colorado offering varying programs. These facilities are responsible for the supervision of over 1,200 inmates at any given time. However, when the length of the average inmate stay at a community correctional facility is factored in, community correctional facilities are responsible for supervision of over 3,200 inmates during a calendar year. Private community correctional facilities will be utilized more in future as the total inmate population continues to grow. The public exposure to these criminals and more violent criminals can be anticipated to double within seven years.

Community correctional facilities are funded by a variety of sources. ComCor received nearly $2.8 million in 1996 from the Department of Corrections. However, that represented less than one-half of ComCor's gross revenues. ComCor receives millions more in payments from the inmates and federal funds. These facts were presented by the Petitioner in the Supreme Court and were essentially unrebutted by ComCor. There were no facts set forth in the trial court.

With a sentence to the prison without

diversion to a community correctional facility, an inmate would be under twenty-four (24) hour supervision and pose no risk to the public. Under those circumstances, the primary purpose of corrections is served, e.g. the threat posed by the criminal offender to the public is neutralized. Obviously the inmate cannot harm the public while in prison and the strict regimentation attached. The public is safe from the harm posed by the inmate given these procedural safeguards.

If the inmate bypasses prison and enters programs like ComCor as Rutledge did, the procedural safeguards for maintaining public safety must be enhanced in ways other than incarceration. This is possible through emphasis of rehabilitation over retribution and education of the inmate over deterrence. However, the safeguards necessary to adequately supervise inmates focus on a fastidious adherence to program rules and regulations, most importantly compliance with alcohol treatment plans. To safeguard the public, strict construction should be given to procedural safeguards requiring community correctional facilities to inform the referring authority of inmate rules violations. See Section 17-27-105, C.R.S.

To safeguard the public further in instances where the inmate will not be incarcerated in prison under twenty four (24) hour supervision, the community correctional facility should strictly adhere to the inmates plan of treatment. Most ComCor inmates have a plan of treatment to address substance abuse problems and staffing of qualified individuals is touted in ComCor marketing aimed at getting offender referrals. All of

the data which ComCor provides details that substance abuse is nearly expected of the inmates. ComCor, as the largest community corrections facility in Colorado, provides intervention and treatment services.

Therefore, because of the statistics that ComCor itself acknowledges, ComCor cannot claim surprise that its inmates will attempt to skirt rules against alcohol consumption and other forms of substance abuse. At ComCor, fully 85% of all residents have substance abuse problems. Additionally, inmate referrals and intakes contain extensive information regarding past substance abuse. In the instant matter, ComCor had all of the information necessary to determine that Fred Rutledge posed a risk to the public of drinking and driving on the date of his admission. Nonetheless, the Colorado Court of Appeals and Colorado Supreme Courts denied Eric Davenport of his equal protection and due process rights and took away a verdict to compensate him only for injuries without due process and equal protection.

Conclusion

WHEREFORE, the Petitioner Eric Davenport would request that this court accept this case for Certiorari and reverse the decisions of the Colorado Supreme Court and the Colorado Court of Appeals and reinstate the full verdict of the jury.

Respectfully submitted this 18th day of February, 1999.



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Supreme Court, U.S.
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UNITED STATES SUPREME COURT

October 1998 Term

ERIC DAVENPORT, Petitioner,

vs.

COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC., Defendant.

On Petition for Writ of Certiorari to the Colorado Supreme Court

APPENDIX FOR PETITION FOR WRIT CERTIORARI

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OPINION OF THE COLORADO SUPREME COURT REPORTED AT 962 P.2D 963 (Colo. 1998):

SUPREME COURT, STATE OF COLORADO
NO. 97SC 266

ERIC DAVENPORT,

Petitioner,

v.

COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC.,

Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

June 29, 1998

As Modified on Denial of Rehearing July 27, 1998.

We granted certiorari to review the court of appeals decision in *Davenport V. Community Corrections of the Pikes Peak Region, Inc.*, 942 P.2d 1301 (Colo. App. 1997), to consider whether the court of appeals erred in concluding as a matter of law that a private community corrections facility has neither a statutory nor common law duty to protect an individual from the conduct of an offender sentenced to the facility. The court of appeals reversed a jury verdict awarding the plaintiff damages for injuries sustained in an automobile accident involving a community corrections resident. We affirm.

I.

Community Corrections of the Pikes Peak Region, Inc. (Pikes *Peak)* , is a private non-profit corporation that operates a community. corrections facility in Colorado Springs pursuant to a contract with the Division of Criminal Justice of the Colorado Department of Public Safety. Offenders housed at Pikes Peak are required to maintain steady employment, undergo random drug and alcohol testing, pay rent on a weekly basis, and attend budgeting classes. Pikes Peak participants are only permitted to leave the facility for work, job searching, or pursuant to a valid curfew, weekend, church, overnight, or furlough pass.

On April 21, 1966, Fred Rutledge was sentenced directly to community corrections for eight years after being convicted of second degree burglary. As a condition of his sentence, Rutledge was ordered to undergo treatment for alcohol abuse. Rutledge was admitted to Pikes Peak on April 28, 1968. On several occasions during his eight and one-half month stay at Pikes Peak, Rutledge violated rules pertaining to the administration Qf the facility. Specifically, Rutledge (1) was late signing in; (2) failed to take anta-

buse on three occasions;[1] (3) failed two drug tests; (4) twice tested positive for alcohol;[2] and (5) was involved in a careless driving incident. Although these offenses were classified by Pikes Peak as major offenses which could, depending upon the severity and circumstances of the offense, result in notification to the sentencing judge, the sentencing judge was never notified.

On January 14, 1989, Rutledge was permitted to leave Pikes Peak on a weekend pass. Rutledge went to the house of Eric Davenport, a friend and former resident at Pikes Peak. At the house, Rutledge and Davenport began drinking beer. Later, they left in Rutledge's car, which Rutledge drove.[3] After stopping at a liquor store, Rutledge drove at a high rate of speed and rolled the automobile. Davenport suffered permanent de-

1 Antabuse contains the drug disulfiram, which produces a severe adverse physical reaction when mixed with alcohol. Antabuse is used to create an aversion to alcohol in the treatment of chronic alcoholism.

2 One of the two tests revealed that Rutledge's blood alcohol content was 0.27. On the night of that test, Rutledge apparently drove himself and two other residents back to pikes Peak following a disagreement with his ex-wife. Following an administrative hearing, Rutledge was placed on fourteen days' disciplinary restriction, ordered to perform ten hours of extra duty, and lost seven days of good time credit.

3. Prior to being allowed to drive a vehicle, offenders housed at Pikes Peak had to obtain driving authorization. This process required production of a valid license, driving *record*, ownership information, and proof of insurance. Although Rutledge had received authorization from Pikes Peak to drive three separate vehicles, the vehicle Rutledge was driving on the night in question was apparently not authorized by Pikes Peak.

bilitating injuries in the accident.[4] Rutledge was arrested and charged with vehicular assault, reckless driving, driving under the influence, driving with excessive alcohol content, driving with an expired temporary registration, and driving without compulsory insurance. Rutledge was subsequently terminated from the Pikes Peak program.

On July 13, 1990, Davenport sued Pikes Peak for negligent supervision of Rutledge. In responding to the complaint, pikes Peak designated Rutledge as a non-party at fault pursuant to section 13-21-111.5, 6A C.R.S. (1987). On March 20, 1992, Pikes Peak filed a motion for summary judgment, asserting that Pikes Peak owed no legal duty to Davenport as a matter of law. The trial court denied the motion, concluding that "there is a duty upon entities such as [Pikes Peak] to exercise reasonable care to protect members of the public from harm caused by persons' in their custody.

Following a trial, the jury found Pikes Peak ninety percent at fault for Davenport's injuries and allocated the remaining ten percent of fault to Rutledge. No fault was assigned to Davenport. The jury then assessed economic damages at $435,000, disfigurement damages at $10,000, and non-economic damages at $1,468,000. After reducing the assessed non-economic damages to ~250,000 pursuant to section 13-21-102.5, 6A C.R.S. (1967), the trial court entered judgment for Davenport against Pikes Peak in the amount of $625,500, representing ninety percent of the total damages assessed.

The court of appeals reversed, concluding as a matter of law that Pikes Peak owed no duty to protect Davenport from Rutledge's conduct. Specifically, the court of appeals determined that the statutes governing community corrections did

4. Following the accident, Rutledge had a blood alcohol content of *0.141*

not impose a statutory duty on Pikes Peak to protect members of the public from offenders participating in the program. Additionally, the court of appeals concluded that Pikes Peak owed no common law duty to protect Davenport from Rutledge's conduct. Because it determined that no duty existed, the court of appeals remanded the case to the trial court with directions to dismiss Davenport's complaint.

II.

To recover on a claim of negligence, the plaintiff must establish the existence of a legal duty on the part of the defendant breach of that duty by the defendant, causation, and damages. *See Observatory Corp. v. Daly*, 780 P.2d 462, 465 (Colo. 1989). The initial determination of whether a defendant owes a duty to the plaintiff is a question of law to be considered by the court. *See Casebolt v Cowan*, 829 P.2d 352, 356 (Colo. 1992). A negligence claim must fail if it is based upon circumstances for which the law imposes no duty of care upon the defendant. *See University of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987).

In this case, Davenport challenges the court of appeals' decision as it relates to two different issues concerning pikes peak's duty. We address each issue separately.

A. Statutory Duty

Davenport argues that the legislative scheme authorizing community corrections supports the imposition of a duty of care on Pikes Peak. We disagree.

A legally imposed duty of care may be derived from a legislative enactment. *See Leake v. Cain*, 720 P.2d 152, 162 (Colo. 1986). In this regard, a duty of care is established where the plaintiff is a member of the class the statute was designed to protect, and where the injury suffered is the type of injury which the statute was enacted to prevent. *See id.*

Section 17-27-101, 8A C.R.S. (1989 Supp.),

in effect at the time of the accident, provides as follows:

> (1) It is the purpose of this article to encourage flexibility in the development of community correctional facilities and programs by the department, units of local government, and nongovernmental agencies and to encourage the use of such facilities and programs by sentencing courts. It is the further purpose of this article to provide a procedure through which units of local government and nongovernmental agencies may provide adult services to the department and to sentencing courts.
>
> (2) It is the intent of the general assembly that community correctional facilities and programs be used to protect the public safety by serving the following purposes:
>
> (a) With respect to offenders sentenced to community corrections by the courts, to provide a sentencing option and to increase the potential for victim restitution and offender access to rehabilitation programs;
>
> (b) With respect to offenders transferred to community corrections by the department of corrections for long-term placement, to provide the least restrictive and least expensive custodial setting for such offenders;
>
> (c) With respect to other offenders transferred to community corrections by the department of corrections for short-term prerelease placement, to provide programs to effectuate the reintegration of such offenders into the community and to ensure that such offenders have the opportunity for transitional community placement before their release from custody.

Additionally, section 17-27-114(1), 8A C.R.S. (1986), provided that,

> [w]here the administrator of a community

> correctional facility ... has cause to believe that an offender placed in a community correctional facility has violated any rule or condition of his placement in that facility or cannot be safely housed in that facility, the administrator ... shall certify to the appropriate judicial or executive authority the facts which are the basis for his belief and execute a transfer order . . . to transport the offender to the county jail in the county in which the facility is located where he shall be confined pending a determination by the appropriate court or executive authorities as to whether or not the offender shall remain in community corrections.

The legislative scheme authorizing the use of community corrections explicitly provides that one of its goals is to promote public safety. *See* § 17-27-101(2) Contrary to Davenport's arguments, however, the community corrections statutes are not designed to protect the public from the immediate threat posed by participating offenders.[5] Instead, community corrections promote long-term public safety by gradually reintegrating the offender into society using nontraditional rehabilitation techniques. *See* § 17-27-101(2); *Wilson v. People*, 747 P.2d 638, 640 (Colo. 1987). Furthermore, although section 17-27-114(1) requires community corrections administrators to report violations of placement conditions, the court of appeals correctly notes that any duties created by that obligation were owed directly to the relevant judicial or executive authorities" and not the general public. *See*

5 In fact, placing offenders in the "least restrictive and least expensive custodial setting" seemingly places the public in more immediate danger than the restrictive and costly option of placing offenders in prison. See § 17-27-101(2)(b)

Davenport, 942 P.2d at 1304; *see also Lamb v. Hopkins*, 492 A.2d 1297, 1305-06 (1985)(explaining that probation orders and statutes requiring probation officers to notify court of any probation violations created *a* duty to the court and not the general public)

The community corrections statutes do not create a class of persons requiring legislative protection and offer no indication that, in authorizing the use of community corrections, the General Assembly sought to prevent injuries such as Davenport's. *See Leake*, 720 P.2d at 162. Accordingly, we agree with the court of appeals that the community corrections statutes do not create a statutory duty of care.

B. Common Law Duty

Davenport also argues that Pikes Peak owed him a common law duty to protect him from Rutledge's misconduct. We disagree.

Where a person should reasonably foresee that his act, or failure to act, will involve an unreasonable risk of harm to another, there is a duty to avoid such harm. *See Leake*, 720 P.2d at 160. Generally, however, a person has no duty to prevent a third person from harming another absent special circumstances warranting imposition of such a duty. *See Id.; see also* Restatement (Second) of Torts § 315 (1965)[6]. We have previously focused judicial attention on the following factors in considering whether to impose an actionable common law duty on a defendant who fails to prevent a third person from harming another:

---

6 The difference between misfeasance and nonfeasance has been summarized as follows:

> In determining whether a defendant owes a duty to a particular plaintiff, the law has long recognized a distinction between action and a failure to act--that is to say, between active misconduct working positive injury to others [misfeasance] and passive inaction or a failure to take steps to protect them from

(1) the existence of a special relationship between the parties; (2) the foreseeability of harm to others; (3) the social utility of the defendant's conduct; (4) the magnitude of the burden of guarding against injury or harm; and (5) the practical consequences of placing a duty upon the defendant. *See Perreira v. State*, 768 P.2d 1198, 1214-15 (Colo. 1969); *Taco Bell, Inc. V. Lannon*, 744 P.2d 43, 46 (Colo. 1987).

Whether a special relationship exists between Pikes Peak and Rutledge depends, in large part, upon the level of control exercised by Pikes peak over its residents. *See Perreira*, 768 P.2d at 1215-16; *see also* Restatement (Second) Torts § 319 (1965). Although Pikes Peak serves a custodial role and has a contractual obligation to closely monitor the activities of its residents, Pikes Peak exerts far less control over its residents than a prison. Pikes Peak residents maintain full-time employment, provide their own transportation, and readily obtain curfew, weekend, church, overnight, and furlough passes. Thus, offenders housed at Pikes Peak spend a substantial amount of time off the premises without direct supervision. We are therefore persuaded that the level of control exerted by Pikes Peak over Rutledge is insufficient to establish a special relationship in this case. *See Baumgart v. County of Grant*, 50 Wash. App. 671, 750 P.2d 271, 274-75 (1988).

> harm [nonfeasance]." . . "The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.

Whitlock, 744 P.2d at 57 (quoting W. Page Keeton et al., *Prosser* and *Keeton* on the Law of Torts § 56, at 373 (5th ed. 1984))

Furthermore, there is no special relationship between Pikes Peak and Davenport because Davenport did not depend upon Pikes Peak to alert him of the known and obvious dangers associated with riding in Rutledge's car after both men had been drinking. *See* Restatement (second) of Torts § 314 A cmt. b (1965)(dependence is a basis for recognition of a special relationship); *see also Mile Hi Concrete, Inc. v. Matz*, 342 P.2d 198, 203 (Colo. 1992) (explaining that "[w]hen a manufacturer or seller knows or should know of unreasonable dangers associated with the use of its product and the dangers are not obvious to product users, a manufacturer has an obligation to warn of the dangers and a breach of that obligation constitutes negligence") *Whitlock*, 744 P.2d at 62 (explaining that "[t]here exists no special relationship between the parties that justifies placing a duty upon the University to protect [plaintiff] from the well-known dangers of using a trampoline")

While it is foreseeable that reintroducing convicted criminals into the community will result in some aberrant behavior, the dangers associated with community corrections in general are insufficient to establish the requisite foreseeability needed to impose a duty of care. *See Henderson v. Gunther*, 931 P.2d 1150, 1158 (Colo. 1997) (explaining in the context of a § 1983 action that "we recognize that many state activities have the potential for creating some danger. However, not every danger or vulnerability to danger created by the State gives rise to a corresponding duty to protect") . To create such a duty, the authorities responsible for supervising the offender must or should be aware that the offender possesses a particular trait that poses a danger to the plaintiff. *See* Restatement (Second) Torts § 319. Here, Rutledge was convicted of second degree burglary and, although he was being treated for alcoholism, there are only two reported instances of his violating Pikes

Peak's alcohol policy during his eight and one-half months at Pikes Peak. In both of the instances involving alcohol use, Rutledge was disciplined. While one of these violations also involved Rutledge's use of an automobile, we find that this incident and the isolated and nonviolent behavior arising fr6m Rutledge's alcohol use do not establish that Pikes Peak knew or should have known that Rutledge posed a significant risk of harm to Davenport.

On a more general level, there is a high degree of social utility associated with community corrections programs such as Pikes Peak. Community corrections are state-funded community-based programs designed to divert offenders from correctional facilities and reintegrate incarcerated offenders into society. *See People V. Abdul*, 935 P.2d 4, 6 (Colo. 1997). As we have previously observed,

> [c]ommunity corrections programs utilize a Variety of means, including halfway houses and work release programs, to enable offenders to reside in the community. The basic objective of such programs is "to limit confinement to the extent necessary to assure reasonable supervision while permitting a gradual reintegration of the offender into the society to which the offender would eventually return"

Wilson, 747 P.2d at 640 (quoting *American Bar Association Standards for Criminal Justice*, Sentencing Alternatives and Procedures, Standard 18-2.4, Commentary *at* 102 (1986 Supp.) Community corrections programs also provide sentencing judges with an intermediate penalty that is more severe than probation, yet not as harsh as incarceration. *See Beecroft v. People*, 874 P.2d 1041, 1045 (Colo. 1994); *People ex rel. Van Meveren v. District Court*, 195 Colo. 34, 36, 575 P.2d 4, 6 (1978). Furthermore, the General Assembly has determined that direct sentencing to community cor-

rections promotes public safety by increasing the potential for victim restitution and by providing offenders with access to rehabilitation programs. *See* § 17-27-101(2) (a).

Finally, the fiscal savings associated with the community corrections program are considerable. *See* Lynn S. Branham, *A Federal Comprehensive Community Corrections Act: Its Time Has Come*, 12 T.M. Cooley L. Rev. 399, 403-07 (1995.)[7] Imposing an actionable duty in this case would have wide-ranging practical consequences in the community corrections system. Clearly, each offender sent to community corrections poses a potential danger to the public because the offender has engaged in criminal behavior in the past and is likely to have a substance abuse problem.[8] *See*

---

[7] One commentator has explained that in 1993, it cost an average of $19,118.70 to confine one person in jail for a year. See Branham, *supra* at 403. Conversely, the commentator explains that

> [i]f offenders are punished in the community rather than incarcerated, they can, if employed, retain their jobs and continue working. . . . [T]here are economic benefits -- to taxpayers, to victims, and to the families of offenders. Offenders who work add, through the payment of taxes, money to the public coffers. They are also better able to pay restitution to the victims of their crimes. And they can continue to financially support their families, instead of having the taxpayers support them through welfare payments.

Id. at 407.

[8] Steven Gilmore, the director of operations at Pikes Peak, testified that approximately eighty-five percent of offenders participating in the Pikes Peak diversion program have some level of substance abuse problem.

Martinez v. California, 444 U.S. 277, 281, 100 S. Ct. 553, 62 L.#d.2d 481 (1980) (explaining that "the basic risk that repeat offenses may occur is always present in any parole system") Therefore, requiring Pikes Peak to act as the insurer of its residents would subject community corrections facilities to substantial liability exposure. Furthermore, imposition of a legal duty in this case would subvert the effectiveness of the community corrections program. Pursuant to their authority to "accept, reject or reject after acceptance the placement of any offender in its community correctional facility," each community corrections facility would be forced to screen out offenders posing a foreseeable threat to the general public, thereby limiting the number of offenders placed in the program. *See* § 17-27-103(3); *People v. Wilhite*, 817 P.2d 1017, 1019 (Colo. 1991). Once offenders are admitted into community corrections, the facility would be forced to *restrict* an offender's community access in order to limit its exposure. Besides the obvious financial burden associated with this increased supervision, program participants would be deprived of the opportunity to fully reintegrate themselves into their communities. *See Wilson*, 747 P.2d at 640.

After considering each of the factors used to determine whether a defendant owes a common law duty to prevent a third person from harming the plaintiff, we hold that the court of appeals correctly ruled as a matter of law that pikes Peak owed Davenport no duty to protect him from Rutledge's misconduct.

III.

The decision of the court of appeals is affirmed.

OPINION OF THE COLORADO COURT OF APPEALS REPORTED AT 942 P.2D 1301 (Colo. App. 1997):

COLORADO COURT OF APPEALS
CASE NO. 94 CA 1283

Eric DAVENPORT, Plaintiff-Appellee and Cross-Appellant,

V.

COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC., Defendant-Appellant and Cross-Appellee.

No. 94CA1283.

Colorado Court of Appeals,
Div. II.

Jan. 9, 1997.

As Modified on Denial of Rehearing

March 6, 1997.

Certiorari Granted Sept. 8, 1997.

Opinion by Judge Rothenbert.

In this negligence action, defendant, Community Corrections of the Pikes Peak Region, Inc., (Pikes Peak) appeals the judgment entered on a jury verdict finding it liable to plaintiff, Eric Davenport, for injuries he sustained in an automobile accident. Davenport cross-appeals limitations on his damages and the partial denial of his motion for payment of costs. We reverse the judgment in favor of Davenport and remand with directions to dismiss the complaint.

Pikes Peak is a private not-for-profit corporation that operates a halfway house community corrections facility under a contract with the Division on Criminal Justice of the Colorado Department of Public Safety.

On January 14, 1989, Fred Rutledge, who was then a resident of Pikes Peak's diversion program, was permitted to leave the facility on a weekend pass. Rutledge and Davenport were friends and gathered with other friends to socialize and drink. After Rutledge became intoxicated, he and Davenport left the gathering, and Davenport willingly got into Rutledge's car.

With Rutledge driving and Davenport the passenger, the two drove to a nearby liquor store to buy more beer. Rutledge lost control of his vehicle, it crashed, and Davenport suffered permanent debilitating injuries as a result of the accident.

Davenport later filed this action against Pikes Peak contending that: (1) it negligently had failed to follow statutory directives and its own policies with regard to Rutledge; and (2) Pikes Peak's failure to follow those procedures caused the accident in which he was injured. Pikes Peak designated Rutledge as a non-party at fault pursuant to § 13-21-111.5, C.R.S. (1987 Repl.Vol. 6A).

At trial, the jury found Pikes Peak liable for 90 percent of Davenport's injuries and Rut-

ledge liable for 10 percent of the injuries. It then assessed total economic damages at $435,000, damages for disfigurement at $10,000, and non-economic damages at $1,468, 000. The trial court reduced Davenport's non-economic damages to $250,000, entered judgment for him against Pikes Peak in the amount of $625,500, and awarded him costs.

I. Duty

Pikes Peak first contends the trial court erred in determining that it had a duty to protect Davenport from Rutledge's dangerous behavior. We agree.

The elements of a negligence action consist of a legal duty, a breach of the duty, causation, and damages. *Casebolt v. Cowan,* 829 P.2d 352 (Colo.1992). A negligence claim fails when it is based on circumstances for which the law does not impose a duty. *Greenberg v. Perkins,* 845 P.2d 530 (Colo. 1993).

In determining whether the law imposes a duty on a defendant, several factors are relevant, including: the risks involved, the foreseeability and likelihood of injury as weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against the injury or harm, and the consequences of placing the burden on the defendant. *Taco Bell Inc. v. Lannon,* 744 P.2d 43 (Colo.1987).

Whether a defendant owes a plaintiff a duty to act or refrain from acting in order to avoid injury is a question of law determined by the court. *Casebolt v. Cowan, supra*

Here, in a pretrial order, the trial court determined that Pikes Peak owed a duty to Davenport, but did not clarify whether the duty was based on statutory or common law grounds. Pikes Peak asserts that neither basis supports the imposition of a duty here. We agree.

A. Statutory Duty

Pikes Peak asserts, that the statues governing the community corrections process did not impose a duty upon Pikes Peak. We agree.

Before a private tort remedy is available against a nongovermental defendant for violating a statutory duty, a plaintiff must show that: (1) he or she is a member of the class intended to be benefitted by the statute and (2) the injury suffered by the plaintiff is of the type the statute was designed to prevent. Lyons *v. Nasby,* 770 P.2d 1250 (Cole. 1989); *see* also *Allstate Insurance* Co. *v. Parfrey,* 830 P.2d 905 (Colo.1992); *Largo Corp. v. Crespin,* 727 P.2d 1098 (Colo.1986).

In construing statutes, we first examine the statutory language itself, giving words and phrases their commonly accepted and understood meaning. *Resolution Trust Corp. v. Heiserman,* 898 P.2d 1049 (Colo. 1995). Statutes relating to the same subject matter should be construed together to give effect to the legislative intent. *See R. E.N. v. Colorado Springs,* 823 P.2d 1359 (Colo.1992) (fn.5).

The legislative declaration for the community corrections statutes in effect at the time of the accident contained the following pertinent language:

> (1) It is the purpose of this article to encourage flexibility in the development of community correctional facilities and programs by the department, units of local government, and nongovernmental agencies and to encourage the use of such facilities and programs by sentencing courts. It is the further purpose of this article to provide a procedure through which units of local government and nongovernmental agencies may provide adult services to the department and to sentencing courts.
>
> (2) It is the intent of the general assembly that community correctional facilities and programs be used to *protect the public*

safety by serving the following purposes:

(a) With respect to offenders sentenced to community corrections by the courts, to provide a sentencing option and to increase the potential for ... offender access to rehabilitation programs....

Colo. Sess. Laws 1987, ch. 331, § 17-27-101 at 1824 (1st Regular Session Supp.) (emphasis added).

Another section in the community corrections statutes provided directions for administrators of community corrections facilities when reporting residents' violations of their sentencing conditions. At the time of the automobile accident, that section provided:

> Where the administrator of a community correctional facility or any other appropriate supervision authority has cause to believe that any offender placed in a community correctional facility has violated any rule or condition of his placement in that facility ... or cannot he safely housed in that facility, the administrator ... shall certify to the appropriate judicial or executive authorities the facts which are the basis for his belief and execute a transfer order ... to transport the offender to the county jail in the county in which the facility is located where he shall be confined pending a determination by the appropriate court or executive authorities as to whether or not the offender shall remain in community corrections.

Colo. Sess. Laws 1984, ch. 128, § 2 at 529-30 (presently codified with amendments at § 17-27-104(6), C.R.S. (1996 Cum.Supp.)).

Community corrections programs are intended to protect public safety. The language of the legislative declaration indicated that the General Assembly sought to achieve this goal by giving courts more sentencing options, by enabling

offenders to pay restitution to their victims, and by giving offenders greater access to rehabilitation programs. While its terms imposed duties on administrators of community corrections facilities, those duties were owed directly to the relevant judicial or executive authorities.

Section 17–27–114 specifically required an offender sentenced to a community corrections facility to comply with the rules of the facility. *Downing v. People,* 895 P.2d 1046 (Colo. 1995). Under that statute, if an administrator of a community corrections facility believed a resident had violated a condition of placement, the administrator was required to certify to the sentencing court the facts underlying the alleged violation, and to transfer the resident to the county jail pending resolution of the matter. *Wilson v. People,* 747 P.2d 638 (Colo.1987).

The purposes underlying § 17–27–114 are analogous to the purposes of probation revocations. That is, when a trial court sentences an offender to probation or to community corrections, it requires the offender to obey certain conditions. *Compare* § 16-11204, C.R.S. (1996 Cum. Supp.) *with* § 17–27-105(1)(b), C.R.S. (1996 Cum. Supp.). These conditions promote the goal of reintegrating the offender into a responsible lifestyle and protecting society against recidivism. *See People v. Ressin,* 620 P.2d 717 (Colo.1980) (probation); *Wilson v. People, supra* (community corrections).

In sum, § 17-27-114 provided a mechanism for sanctioning individuals who have violated the conditions of their placement in community corrections, and gave them an incentive to obey the terms of their placement. The statute also required the sentencing court or other referring agency to coordinate with the community corrections facilities. Although members of the general public may have been incidental beneficiaries of the statute, they were owed no actionable duty by its specific terms. *Cf Leake v. Cain,* 720 P.2d

152 (Colo.1986) *see also Lamb v. Hopkins*, 303 Md. 236, 492 A2d 1297 (1985) (Maryland statute similar to § 17-27-114 held to create a duty by probation officer to the court and not to private citizens).

We therefore hold that, because the statute evidenced neither an intent to benefit the public nor a purpose to prevent a particular harm, the statutory scheme in which § 17- 27-114 was codified did not establish a private tort remedy against community corrections facilities. *See* Colo. Sess. Laws 1977, ch. 223, § 17-27-101, et seq., at 941-47.

Accordingly, since the statute did not protect persons in Davenport's position or any other member of the general public, the trial court erred in instructing the jury there was such a duty.

B. Common Law Duty

We also agree with Pikes Peak's contention that it had no common law duty to protect Davenport from Rutledge's conduct.

Generally, a person or entity has no duty to prevent a third party from harming another. However, a duty may arise if a special relationship exists between the actor and the wrongdoer or between the actor and the victim. *Leake v. Cain, supra;* Restatement (Second) Torts § 315 (1965).

Under Restatement (Second) Torts § 319 (1965):

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

This section is not limited to persons who take charge of third parties exhibiting violent or anti-social propensities. *See* Restatement (Second) Torts § 319, illustration 1 (person carrying highly communicable disease may present significant likelihood of bodily harm to others); *see generally Nero v. Kansas State University,*

253 Kan. 567, 861 P.2d 768 (1993) (in action against a university for damages arising out of a sexual assault in university student housing, court rejected claim of special relationship between university and perpetrator; however, using landowner-invitee analysis, court found duty to use reasonable care to protect occupants of coed housing from foreseeable criminal conduct).

Rather, a special relationship may be created by a statute even under circumstances in which the statute does not specifically support a private right of action or application of the negligence *per* se doctrine. *Felger v. Board of County Commissioners*, 776 P.2d 1169 (Colo. App.1989).

According to Davenport, because Pikes Peak had control over Rutledge and knew or should have known he was potentially dangerous, Pikes Peak had a special relationship with Rutledge. Thus, Davenport argues, Pikes Peak had a duty to protect the public from Rutledge. We are not persuaded.

Davenport's reliance on *Perreira v. State*, 768 P.2d 1198 (Colo. 1989) is misplaced. There, the supreme court held that psychiatrists who had treated and released an involuntarily hospitalized mental patient owed an actionable duty to the surviving spouse of a police officer killed by the mental patient shortly after the patient's release.

However, the patient in *Perreira* was hospitalized in part because of his violent behavior. Additionally, the patient had paranoid delusions that police were harassing him. And, throughout his hospitalization, the patient deteriorated, increasingly blaming the police for his physical ailments and missing property. He also expressed an intent to reacquire the gun which police had taken from him during an earlier arrest. Four months after his release from the mental hospital, the patient shot and killed a police officer during an altercation at a conven-

ience store.

In the negligence action brought by the policeman's widow against the treating psychiatrists, the jury found for the plaintiff. On appeal, the supreme court rejected the psychiatrists' contention that they had no actionable duty to protect members of the public from the released patient. It found they had a duty: (1) to exercise due care consistent with the knowledge and skill ordinarily possessed by psychiatric practitioners under similar circumstances in determining whether the patient had a violent propensity which would create an unreasonable risk of serious bodily harm to others; and (2) to take reasonable precautions to protect the public from the danger created by the release of the patient. *Perreira v. State, supra.*

The court based this duty on the weighing of several factors including: the relationship between the psychiatrist and patient; the foreseeability of the serious bodily harm to others resulting from the psychiatrist's decision to release the patient; the social utility of the psychiatrist's decision to release a mentally ill patient from involuntary commitment; the magnitude of any burdens that might devolve on a psychiatrist by virtue of a legal duty of due care in determining whether to release the patient; and the practical consequences of imposing such a duty. *Perreira v. State, supra.*

Although the principles articulated in *Perriera* guide us, we conclude that the facts here are sufficiently distinguishable so as to result in a finding of no duty to this plaintiff.

In a decision involving very similar facts, a Washington appellate court applied the same basic principles used in Colorado and also found no duty. We find that court's analysis helpful here.

Baumgart v. Grant County, 50 Wash.App. 671, 750 P.2d 271 (1988) involved an inmate at a county jail who was prematurely released from jail. Later, he became intoxicated and was in-

volved in an automobile accident in which the plaintiff was injured. Like Rutledge, the inmate in *Baumgart* had a history of alcohol-related offenses and was supposed to have been on antabuse, a drug used in the treatment of alcoholism, while he was in custody. And like Rutledge, the inmate in *Baumgart* was in custody for burglary and not an alcohol-related offense.

The *Baumgart* court held that the plaintiff had failed to show sufficient legal causation for the injury, and that any duty was too remote to establish the defendant's liability. In so holding, the court stated that:

> Legal causation ... rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on (mixed considerations of logic, common sense, justice, policy, and precedent.)

Baumgart v. Grant County, supra, 50 Wash. App. at 674, 750 P.2d at 273 (quoting *Hartley* v. *State*, 103 Wash.2d 768, 779, 698 P.2d 77, 83 (1985)). This causation analysis closely parallels the test used in Colorado for determining the scope of a duty. *See Taco Bell v. Lannon, supra.*

We reach the same conclusion here as did the *Baumgart* court. Like the inmate in *Baumgart* but unlike the mental patient in *Perreria*, Rutledge was confined at Pikes Peak for punitive correction after having been found guilty of burglary. The burglary was not indicative of the kind of behavior which led to the accident injuring Davenport.

Further, the special relationship between Pikes Peak and Rutledge was discernibly less custodial than the involuntary hospitalization involved in *Perreira* or even the custodial relationship between a jailer and a prisoner in a

traditional correctional facility. While Rutledge was provided with alcohol-related therapy, he was not exposed to the intense type of psychiatric examination that an involuntarily committed mental patient presumably would have been provided. Rutledge's custodians also were less well-equipped to diagnose his potentially dangerous propensities than were the psychiatrists in *Perreira*, and they acted within their authority in permitting Rutledge to leave the halfway house. *See Baumgart v. Grant County, supra; see also Moore v. Commonwealth Department of Justice*, 114 Pa. Cmwlth. 56, 538 A.2d 111 (1988).

Also missing here is the degree of foreseeability found in *Perreira*. While Rutledge had been charged with drinking and driving, the driving related charges had been dismissed. Rutledge's sentence to Pikes Peak was based on his conviction for burglary and his punishment was unrelated to his alcoholism. Before the accident, Rutledge was found to have consumed alcohol only on two occasions during the year he resided at Pikes Peak, and many of his other violations of Pikes Peak's rules involved the failure to take antabuse and were unaccompanied by evidence that he had consumed alcohol.

Nor did Rutledge display any bizarre, violent, or aberrant behavior, or any other symptom of alcoholism that would set him apart from numerous other community corrections residents with substance abuse problems. *Compare Perreira v. State, supra, with Baumgart v. Grant County, supra.*

Thus, the linkage between Pikes Peaks' allegedly negligent conduct and the later automobile accident is too attenuated for us to conclude that Rutledge's conduct and Davenport's injuries were reasonably foreseeable to Pikes Peak. *Cf. Casebolt v. Cowan, supra* (trial court erred in granting summary judgment on the duty question in a negligent entrustment case because material questions of fact remained).

A contrary holding would impose upon every halfway house and community corrections facility the choices of acting as an insurer against the negligent conduct of its residents, or imposing substantial restrictions on its residents' access to the outside community. Both alternatives would frustrate the legislative purpose underlying the establishment of community corrections as a sentencing alternative. The threat of boundless liability for a resident's or former resident's conduct also would threaten the financial stability of the community corrections industry, making community corrections a far more costly sentencing option. The alternative of curtailing community corrections residents' access to the outside community would frustrate the legislative goal of reintegrating residents into the law abiding community and encouraging them to remain gainfully employed.

Accordingly, as in *Baumgart*, logic, justice, and common sense persuade us that Pikes Peak had no duty to protect Davenport from Rutledge's negligence. *Baurngart v. Grant County, supra; see generally* Annot., *Liability of Private Operator of "Halfway House" or Group Home Housing Convicted Prisoners Before Final Release for Injury to Third Person Caused by Inmate*, 9 A.L.R. 5th 968 (1993).

II.

Because Pikes Peak did not argue on appeal that it was immune from liability under an extension of the doctrine of quasi-judicial immunity or official discretionary immunity, we do not address the issue.

Pikes Peak's other contentions of error are moot as are Davenport's contentions on cross-appeal, and we do not address them.

The judgment is reversed and the cause is remanded with directions to dismiss the complaint for failure to state a claim on which relief can be granted.

JONES and BRIGGS, JJ., concur.

ORDER ON REHEARING:

SUPREME COURT, STATE OF COLORADO
CASE NO 97SC266
CERTIORARI TO THE COLORADO COURT OF APPEALS,
94CA1283
DISTRICT COURT, EL PASO COUNTY, 90CV3896
ORDER OF COURT

ERIC DAVENPORT, Petitioner,
V.
COMMUNITY CORRECTIONS OF THE PIKES PEAK REGION, INC., Respondent

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Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that the Opinion is modified, and as modified, the Petition for rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JULY 27, 1998.

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE WITH APPROPRIATE CITATIONS:

PROVISIONS OF UNITED STATES CONSTITUTION:

AMENDMENT VII OF THE UNITED STATES CONSTITUTION:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION:
Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS OF COLORADO CONSTITUTION:

ARTICLE II, BILL OF RIGHTS:

In order to assert our rights, acknowledge our duties, and proclaim the principles upon which our government is founded, we declare:

Section 1. *Vestment of political power.* All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

...

Section 3. *Inalienable rights.* All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.

...

Section 6. *Equality of justice.* Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

...

Section 11. *Ex post facto laws.* No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

...

Section 14. *Taking private property for private use.* Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

Section 15. *Taking property for public use - compensation, how ascertained.* Private property shall not be taken or damaged, for public or pri-

vate use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

...

Section 23. *Trial by jury - grand jury.* The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law. Hereafter a grand jury shall consist of twelve persons, any nine of whom concurring may find an indictment; provided, the general assembly may change, regulate or abolish the grand jury system; and provided, further, the right of any person to serve on any jury shall not be denied or abridged on account of sex, and the general assembly may provide by law for the exemption from jury service of persons or classes of persons....

Section 25. *Due process of law.* No person shall be deprived of life, liberty or property, without due process of law.

ARTICLE III, DISTRIBUTION OF POWERS:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in

this constitution expressly directed or permitted.

ARTICLE V, LEGISLATIVE DEPARTMENT:

Section 25. *Special legislation prohibited.* The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say; for granting divorces; laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys and public grounds; locating or changing county seats; regulating county or township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates and constables; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; for limitation of civil actions or giving effect to informal or invalid deeds; summoning or impaneling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or conducting of any election, or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; the protection of game or fish; chartering or licensing ferries or toll bridges; remitting fines, penalties or forfeitures; creating, increasing or decreasing fees, percentage or allowances of public officers; changing the law of descent; granting to any corporation, association or individual the right to lay down railroad tracks; granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases, where a general law can be made applicable no special law shall be enacted.

PROVISIONS OF COLORADO STATUTES:

Section 17-27-115, Colorado Revised Statutes: Where the administrator of a community correction facility or any other appropriate supervision authority has cause to believe that any offender placed in a community correctional facility has violated any rule or condition of his placement in the facility... or cannot be safely housed in that facility, the administrator... shall certify to the appropriate judicial or executive authorities the facts which are the basis for his belief and execute a transfer order... to transport the offender to the county jail in the county in which the facility is located where he shall be confined pending a determination by the appropriate court or executive authorities as to whether or not the offender shall remain in community corrections.